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No. 89-486

In the Supreme Court of the United States

OCTOBER TERM, 1989

ABEL H. HERNANDEZ, PETITIONER

v.

DONALD B. RISE, SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the time limit of 42 U.S.C. 2000e-16 (c), which requires a government employee to file a Title VII employment discrimination suit in federal court within thirty days of receipt of notice of final administrative action on his complaint, is jurisdictional.

2. Whether a properly prepared Title VII complaint is filed within the meaning of 42 U.S.C. 2000e-16(c) when it is submitted to the district court clerk's office and stamped "received," even though it is not entered onto the docket sheet by the clerk's office and marked "filed" at that time.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-11A) is reported at 866 F.2d 800. The opinion of the district court (App., *infra*, 1a-4a) is unreported. The Air Force decision (App., *infra*, 5a-16a), and the EEOC recommended decision (App., *infra*, 17a-34a), are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1989. The petition for a writ of certiorari was filed on May 27, 1989. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 717(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), provides in pertinent part:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, * * * an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

STATEMENT

Petitioner is an American Indian who has been employed since 1982 as a mechanic at Kelly Air Force Base in Texas. At the time of the incident giving rise to this suit, petitioner was employed in the Hydraulic Section repairing equipment, primarily aircraft pumps. The Section required each mechanic to become "certified" for each different type of equipment that the mechanic repaired, and to indicate that certification by stamping the paperwork accompanying each piece of equipment he repaired with his individually assigned number. App., *infra*, 20a-21a.

In the course of an audit of previously repaired equipment, it was discovered that petitioner had re-

paired and stamped several pumps for which he had no certification. As a result, petitioner was reprimanded on October 10, 1985, for falsifying government documents—*i.e.* falsely asserting, through the stamp, that he was authorized to perform the repairs. *Id.* at 18a, 21a-22a.

Petitioner filed an informal complaint of discrimination against the Air Force, alleging that other mechanics who were not Indians were not reprimanded for performing work for which they were not certified. *Id.* at 18a, 22a-23a. After an informal inquiry failed to resolve the complaint to petitioner's satisfaction, he filed a formal complaint of discrimination on October 30, 1985. Pet. App. 3A. On administrative review, an Administrative Law Judge of the EEOC issued a Recommended Decision concluding that petitioner had established a *prima facie* case of racial discrimination, and that the agency's articulated nondiscriminatory reasons for the reprimand were pretextual. App., *infra*., 17a-24a. After further review of the record, on February 16, 1988, the Air Force issued a final decision concluding that the stated reasons for the reprimand were legitimate and adequate, and explaining the basis for that decision. It accordingly rejected the Recommended Decision. App., *infra*, 5a-16a. In notifying petitioner of its decision, the Air Force informed him that he could either seek further administrative review by an appeal to the EEOC, or alternatively file a civil action "in an appropriate United States District Court within *30 calendar days* of receipt of the decision" (App., *infra*, 15a).[1] Petitioner received no-

[1] The notification also informed petitioner that "if you file a civil action, you must name the appropriate Department or Agency head as the defendant. Failure to name the head of

tice of the final Air Force decision and his right-to-sue letter on February 18, 1988. App., *infra*, 2a & n.1.[2]

On March 10, 1988, petitioner submitted his civil complaint alleging discrimination to the Clerk of the United States District Court for the Western District of Texas. The Clerk marked the complaint "received" on that date. Pet. App. 4A. At the same time (as instructed in his right-to-sue letter, App., *infra*, 16a) the petitioner also filed a motion to proceed in forma pauperis and a motion for appointment of counsel. These motions were referred to a United States Magistrate who, on March 29, 1988, granted petitioner's request to proceed in forma pauperis. Pet. App. 4A.[3] On that same day—forty days after the petitioner received notice of the final agency decision and his right-to-sue letter—the district court Clerk formally filed petitioner's complaint by entering it onto the court's docket sheet. Pet. App. 4A-5A.

The district court dismissed the petitioner's complaint for lack of jurisdiction. App., *infra*, 1a-4a. The district court concluded the petitioner's complaint was barred by 42 U.S.C. 2000e-16(c), which requires

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the Department or Agency may result in the loss of any judicial redress you may be entitled to." App., *infra*, 16a.

[2] Although both the district court (App., *infra*, 1a-2a), and the court of appeals (Pet. App. 4A) indicate that the final administrative decision was issued by the EEOC on February 16, 1988 and received by petitioner on February 18, 1988, the record indicates that it was the final Air Force decision that was issued and received on those dates, thereby triggering the time limits for filing the civil action. App., *infra*, 5a; see 42 U.S.C. 2000e-16(c).

[3] Petitioner's motion for appointment of counsel was later denied. Pet. App. 4A.

a government employee to file a Title VII employment discrimination suit in federal district court within thirty days of receipt of notice of a final agency decision, because the petitioner's suit was not filed until March 29, 1988, more than thirty days after his receipt of notice of the final administrative decision and his right-to-sue letter. *Id.* at 3a.

Although it concluded that the petitioner had not been negligent or dilatory in pursuing his Title VII claim in federal court, the court of appeals affirmed the dismissal on the ground that it was bound by Circuit precedent holding the thirty-day filing requirement in Section 2000e-16(c) to be jurisdictional. Pet. App. 9A-11A.

ARGUMENT

1. The United States, as sovereign, is immune from suit save as it consents to be sued. Title VII remedies against the government, which constitute such consent, thus necessarily implicate issues of governmental immunity, see *Brown* v. *GSA*, 425 U.S. 820, 833 (1976). Accordingly, the terms of the statutory consent to be sued in any court define that court's jurisdiction to entertain the suit, *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981), and such waivers of sovereign immunity are to be strictly construed. *Id.* at 161.

For these reasons, the court below correctly concluded that the timely filing requirement in Section 2000e-16(c) is a jurisdictional prerequisite to district court consideration of a federal employee's Title VII complaint. Accord *Sims* v. *Heckler*, 725 F.2d 1143, 1145-1146 (7th Cir. 1984); *Rice* v. *Hamilton Air Force Base Commissary*, 720 F.2d 1082, 1083 (9th Cir. 1983). See also *Hallstrom* v. *Tillamook County*,

110 S. Ct. 304 (1989) (where a party suing under the citizen suit provisions of the Resource Conservation and Recovery Act of 1976 fails to meet the notice and 60-day delay requirements of 42 U.S.C. 6972(b), the district court must dismiss the action as barred by the terms of the statute). But see *Martinez* v. *Orr*, 738 F.2d 1107, 1110 (10th Cir. 1984) (thirty-day limitation period in 42 U.S.C. 2000e-16(c) is not jurisdictional); *Milam* v. *United States Postal Service*, 674 F.2d 860, 862 (11th Cir. 1982) (same); *Saltz* v. *Lehman*, 672 F.2d 207, 208 (D.C. Cir. 1982) (same).

2. There is, however, no need for this Court to address the apparent conflict in the Circuits on that issue in this case (cf. *Stuckett* v. *United States Postal Service*, 469 U.S. 898 (1984) (White, J., dissenting from denial of certiorari petition, citing conflict in Circuits)), because it is not clear that petitioner's complaint was not timely filed. The court below did not expressly address the question whether receipt by the district court Clerk's office of a properly completed discrimination complaint was sufficient to constitute "filing" for purposes of Section 2000e-16(c). See, *e.g.*, *Toliver* v. *County of Sullivan*, 841 F.2d 41, 42 (2d Cir. 1988) (per curiam) (at least where in forma pauperis status is granted, Title VII employment discrimination complaint should be treated as timely filed where it was received by the office of the pro se clerk prior to expiration of the limitations period, even though it was not formally "filed" and entered on the docket sheet until almost a month later); *Sonicraft, Inc.* v. *NLRB*, 814 F.2d 385, 386 (7th Cir. 1987) (notice of appeal or petition for review is filed when received); *Rice* v. *Hamilton Air Force Base Commissary*, 720 F.2d at 1085 ("[I]n the specific context of Title VII, the statutory re-

quirement that an action be 'brought' within the time period is satisfied by presenting a right-to-sue letter to the court and requesting the appointment of counsel") (quoting *Wingfield* v. *Goodwill Industries*, 666 F.2d 1177, 1179 n.3 (8th Cir. 1981)).

The court of appeals appears to have assumed that petitioner's complaint was not filed until it was so stamped by the Clerk's office (Pet. App. 4A-5A, 6A), and thus that the filing was jurisdictionally out-of-time. The court reluctantly concluded that two previous opinions of the Circuit, *Bell* v. *Veterans Administration Hospital*, 826 F.2d 357, 360-361 (5th Cir. 1987), and *Brown* v. *Department of Army*, 854 F.2d 77, 78 n.1 (5th Cir. 1988), required this result. See Pet. App. 8A-10A. We disagree. The facts in those cases were significantly different from the situation here, and the reasoning in those cases does not require dismissal of petitioner's suit.

In both *Bell* and *Brown*, the complaining federal employee made a timely filing identifying as the defendant the employing agency, rather than the agency head—as required by Section 2000e-16(c). 826 F.2d at 359; 845 F.2d at 78. The Fifth Circuit concluded in both cases that a subsequently filed amendment identifying the proper party defendant would not relate back to save the original filing. 826 F.2d at 360-361; 854 F.2d at 78-79.

By contrast, petitioner here named the proper party in his federal complaint, and there was thus no need to consider the effect of an amendment filed after the expiration of the statutory time limit. Thus, neither *Brown* nor *Bell* requires the result reached by the court of appeals.[4]

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[4] Indeed, the district court in *Bell* assumed that the original complaint was timely filed when it was presented to the

Because neither party below briefed the issue whether a non-defective complaint submitted to the district court Clerk's office within thirty days of receipt of a right-to-sue letter satisfies the statute's filing deadline, the court of appeals did not address that issue. Had it done so, it might well have reached a different result under the circumstances of this case. See *Toliver* v. *County of Sullivan*, 841 F.2d at 42; Pet. App. 9A. It would therefore be appropriate to remand this case to the court of appeals for consideration of whether receipt of a non-defective discrimination complaint by the Clerk's office constitutes "filing" for purposes of Section 2000e-16(c).

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case remanded for consideration of the issue identified above.

Respectfully submitted.

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Attorneys

DECEMBER 1989

Clerk's office and marked "received" within 30 days after Bell received the final agency decision, even though the complaint was not stamped "filed" until the 47th day after his receipt of that decision. The court of appeals did not question that assumption. See 826 F.2d at 359. Accordingly, to the extent that *Bell* is relevant to the instant case, it suggests that petitioner's complaint was timely filed.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-88-CA-237

ABEL H. HERNANDEZ, PLAINTIFF

vs.

EDWARD C. ALDRIDGE, JR.,
Secretary of the Air Force, DEFENDANT

ORDER

[Filed Aug. 30, 1988]

On this date came on to be considered Defendant's Motion to Dismiss Pursuant to Rule 12, F. R. Civ. P., filed in the above-styled and numbered cause on June 8, 1988; and Plaintiff's response thereto, filed on August 29, 1988.

On October 30, 1985, Plaintiff filed his Complaint of Discrimination in the Federal Government, claiming he had been discriminated against on the basis of his race (American Indian). Plaintiff pursued his administrative remedies concerning these allegations, and on February 16, 1988, the Equal Employment Opportunity Commission ("EEOC") issued its final decision finding that, while Plaintiff had established a prima facie case of race discrimination, the Air Force had shown legitimate, nondiscriminatory reasons for reprimanding Plaintiff. Plaintiff received

this final decision and his Notice of Right to Sue letter on February 18, 1988.[1]

On March 10, 1988, Plaintiff submitted his Complaint to the United States District Clerk in which he attempted to bring suit on the basis of his discrimination claim. The Complaint was marked "Received" by the Clerk's office. It was not filed at that time. Plaintiff also filed a motion to proceed in forma pauperis with his Complaint and a motion for appointment of counsel. Those motions were referred to United States Magistrate Robert B. O'Connor who, on May 29, 1988, granted the request to proceed in forma pauperis and denied the motion for appointment of counsel. Plaintiff's Complaint was then filed by the District Clerk on May 29, 1988, forty days after Plaintiff received the final decision and Notice of Right to Sue letter.

Defendant's Motion to Dismiss claims that dismissal pursuant to Fed. R. Civ. P. 12(b)(1) is proper in this case because Plaintiff did not timely file his Complaint.

Title VII lawsuits are required to be brought within thirty days of the receipt of notice of the EEOC's final decision. 42 U.S.C. § 2000e-16(c). The thirty-day filing limitation is a jurisdictional requirement. *Brown v. Dept. of Army*, No. 87-2653, slip. op. 4861, 4863 (5th Cir. Aug. 16, 1988); *Eastland v. Tennessee Valley Authority*, 553 F.2d 364, 368 (5th

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[1] While Plaintiff's Complaint states that Plaintiff received the final decision and Notice of Right to Sue letter on February 16, 1988, Defendant has provided a copy of its "green card" indicating Plaintiff received these documents on February 18, 1988. To give Plaintiff the most favorable time period for jurisdictional purposes, the Court will use the February 18, 1988 date shown on Defendant's green card.

Cir.), *cert. denied*, 434 U.S. 985 (1977). Plaintiff received notice as to the EEOC's decision concerning his discrimination claim on February 18, 1988. His Complaint concerning this claim was filed on March 29, 1988, well past the thirty day limitations period.

The fact that the Complaint was not filed because of Plaintiff's pending motion to proceed in forma pauperis and for appointment of counsel does not toll the limitations period. As the Fifth Circuit stated in a case involving the same facts as are present here,:

> We are not unsympathetic to [Plaintiff's] request for equitable relief, and we certainly understand his frustrations as a *pro se* plaintiff in dealing with complex procedural requirements that may seem unnecessarily burdensome. This circuit, however, has held that the thirty-day civil action filing limitation for federal employees in 42 U.S.C. § 2000e-16(c) is a "jurisdictional requirement" that is not subject to equitable tolling. . . . We are therefore bound by the law of this circuit and cannot toll the time limitation; nor, for the same jurisdictional reason, can be consider relief in the form of equitable estoppel.

Bell v. Veterans Admin. Hospital, 826 F.2d 357, 360-61 (5th Cir. 1987). Plaintiff's Title VII claims are therefore subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(1).

Accordingly, it is hereby ORDERED that Defendant's Motion to Dismiss Pursuant to Rule 12, F. R. Civ. P. is GRANTED such that Plaintiff's Complaint and claims in this cause of action against Defendant is DISMISSED pursuant to Fed. R. Civ. P. 12 (b)(1).

SIGNED and ENTERED this 30th day of August, 1988.

/s/ Edward C. Prado

EDWARD C. PRADO
United States District Judge

APPENDIX B

DEPARTMENT OF THE AIR FORCE
Washington, D.C. 20330-1000

[DoD Logo]

Office of the Assistant Secretary

16 February 1988

Mr. Abel H. Hernandez
406 H Street
San Antonio, Texas 78220

Re: Air Force Discrimination
Complaint Decision
Kelly AFB Docket No. KH860451000
AFCARA/AED Docket No. E-86-0159-0
AFCARA/ARD Docket No. AR000880069
EEOC Docket No. 360-87-0066X

Dear Mr. Hernandez:

On October 30, 1985, after attempts at informal resolution, you filed a formal complaint of discrimination alleging that based upon your race (Indian-American), you were discriminated against on October 10, 1985, when you received a letter of reprimand for falsification of official documents. Your complaint was investigated during the period September 8-10, 1986, by an Air Force EEO Complaint Invesitgator assigned to the Appellate Examining Division of the Air Force Civilian Appellate Review Agency. The Investigator recommended a finding of no discrimination and recommended that relief not be granted to you. The San Antonio Air Logistics Center Vice Commander, Kelly Air Force Base, Texas, issued a letter of proposed disposition dated March

13, 1987, adopting the findings and recommendations of the investigator. Because of your continued dissatisfaction, you requested a hearing; and an Administrative Judge assigned to the San Antonio District Office of the Equal Employment Opportunity Commission (EEOC) conducted a hearing on your complaint on May 21, 1987. The case was subsequently reassigned to another Administrative Judge on September 8, 1987. The Administrative Judge's recommended decision was transmitted to the Air Force at the Appellate Review Division of the Air Force Civilian Appellate Review Agency where it was processed for decision. This letter notifies you of the final Air Force decision on your complaint as required by 29 C.F.R. Section (§)1613.221.

The Administrative Judge defined the issue of your complaint as:

> [Whether you were] discriminated against because of [your] race (American-Indian), when [you] received a Letter of Reprimand on October 10, 1985[.]

We find this formulation of the issue to be an adequate basis for adjudication of your complaint.

In the conventional process for adjudicating a complaint of discrimination, the complainant must carry the initial burden of establishing by a preponderance of the evidence a prima facie case of discrimination. The employer must then articulate some legitimate, nondiscriminatory reason for the challenged action. To prevail, the complainant must then show by a preponderance of the evidence that the stated reasons are pretext to mask discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973); *Texas Department of Community Affairs v.*

Burdine, 450 U.S. 248, 25 FEP Cases 113 (1981). The ultimate burden of persuading the trier of fact that management intentionally discriminated against the complainant remains at all times with the complainant. *Burdine*, 25 FEP Cases at 115. Management need not establish that it conducted its business in an optimum fashion, and management may not be found to have discriminated or to have taken reprisal merely because the complainant or an adjudicator would have preferred that management conduct its business differently. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 17 FEP Cases 1062, 1066 (1978).

The Administrative Judge stated that in your situation, a prima facie case of discrimination would be established if you showed that you are a member of a protected group, that similarly situated employees outside of your protected group were not similarly situated for similar offenses, or that the discipline was taken under circumstances, if left unexplained, that would support an inference of discrimination (Administrative Judge's Recommended Decision, p. 4). The Administrative Judge found that you established a prima facie case of discrimination based on your race and that management articulated legitimate, nondiscriminatory reasons for reprimanding you. The Administrative Judge further found that these reasons were pretext to mask discrimination. Accordingly, the Administrative Judge recommended a finding of discrimination. As corrective action, the Administrative Judge recommended removal of the reprimand from your records and restoration of any lost employment benefits.

We find that the prima facie criteria set forth in *McDonnell Douglas*, a nonselection for employment

case, are not directly applicable to your complaint. However, the prima facie case method established in *McDonnell Douglas* was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 17 FEP Cases 1062, 1066 (1978). In cases where management has provided a legitimate, nondiscriminatory explanation for its actions, whether or not you properly made out a prima facie case is no longer relevant. *Postal Service Board of Governors v. Aikens*, 31 FEP Cases 609 (1983). Thus, the development of specific prima facie criteria that would best fit the circumstances of your case is not necessary to fully adjudicate your complaint.

You were charged with "falsification of official government documents by misusing your mechanic certification M-Stamp Number 80413" on June 6, July 2, 11, 22, and 23, 1985. There was no dispute that you actually performed as specified on the work control documents bearing your mechanic certification stamp number (Investigative File, Exhibits [IF, Exhs.] A-18 and A-23). In proposing and deciding to reprimand you, management supported its action by affirming that you had been briefed on the Production Acceptance Certification (PAC) Program; you were trained and certified to stamp work performed only on work order numbers 06020A, 06016A, 06057A, 06017A, and 06002A; and that you used your stamp to certify tasks on pumps for which you did not have certification. Your immediate supervisor, Mr. Kenneth L. Kieltyka, proposed the reprimand. Your second-level supervisor, Mr. Javier A. Trevino, was the deciding official in the issuance of

the reprimand (IF. Exhs. A-21 and A-23). Also considered was an earlier reprimand for failure to use your safety glasses. Management denied that your race motivated the decision to take disciplinary action.

We find, as did the Administrative Judge, that management articulated legitimate, nondiscriminatory reasons for issuing the reprimand.

In line with the three step analytical process established in *McDonnell Douglas*, cited above, we now must determine whether these reasons are pretextual. The forms and procedures established under the PAC Program are complex to those unfamiliar with the production environment. It is obvious from the hearing transcript that some confusion in this regard was encountered. While some confusion was clarified during the hearing, the reassignment of your case to a second Administrative Judge negated the benefits of this clarification process. In reviewing the recommended decision, we found several instances where documents and testimony were misinterpreted, leading to erroneous conclusions and an inappropriate finding of discrimination. For these reasons, we do not agree with the Administrative Judge's finding of pretext and we, therefore, reject his recommended decision and corrective actions.

In attempting to establish pretext, you asserted that because you had previously worked on the pumps in question, you believed that you were certified to do so. In your rebuttal to the proposal to reprimand (IF, Exh. A-22), you referred to three entries in the "Test Stand log book in Building 347" which allegedly indicated that you worked on these pumps on three different occasions—January 5, 1983, May 22 and 24, 1984. During the hearing, the test stand log book was reviewed and questions were asked to Mr. Kieltyka and Mr. Trevino (Hearing Transcript

[HT], pp. 78 and 158-159). However, the log book was not entered into the record as evidence at any time during the processing of your complaint. Your assertion that you had previously been allowed to work on the pumps in question is, therefore, unsupported by the record.

The record shows that on January 10 and June 21, 1985, you signed documents identifying all pumps on which you had been trained and for which you were certified to perform maintenance. On the January 10 entry, the pumps in question are not annotated on the card. In your testimony, you indicated that a previous record had been lost and that you were aware that this was a new card. However, you did not show that you requested the inclusion of additional pumps when the new card was completed (IF, Exh. A-16, pp. 95-96). Additionally, the June 21, 1985, documented forms contain entries on numerous pumps. Your initials are clearly indicated next to the items for which certification had been documented on your mechanic certification record. However, although the pumps in question were listed on the form, you neither indicated completion of training nor annotated that you wished to begin on-the-job training (OJT) on these pumps (IF, Exh. A-15, pp. 64-91). Your assertions of previous and continuing certification are, therefore, unfounded.

In further attempting to establish pretext, you argued that other mechanics were not reprimanded for performing work for which they were not certified. The review of comparative evidence in disparate treatment cases is premised on a comparison of similarly situated persons. "Similarily situated" generally means that the persons who are being compared are so situated that it is reasonable to believe they would receive the same treatment in the context

of a particular employment decision. B. Schlei and P. Grossman, *Employment Discrmination Law*, p. 16, note 6.

The record indicates one instance in which an infrequently repaired pump was brought into the unit for maintenance. The supervisor assigned the pump to a mechanic he believed had been previously trained on the pump. Upon completion of the maintenance, the supervisor determined that the individual had not been certified on this item. The item was inspected and certification was granted by appropriate procedures (HT, pp. 83-86.) We find the circumstances surrounding this incident to be sufficiently different from the offenses with which you were charged to preclude a determination that this person was similarly situated to you.

A quality assurance specialist testified that on six or seven walk-through inspections, she had observed work being performed by other mechanics who were not certified to repair particular items. The quality assurance specialist further testified that she then made appropriate notification by completing the AFLC Forms 459, G056 Quality Data Input Record (HT, pp. 144-145.) The record contained no evidence establishing that these other mechanics actually stamped these parts and there are no indications of the action taken by the supervisors in response to the AFLC Forms 459. Therefore, the quality assurance specialist's testimony was inconclusive. We determined, accordingly, that the record evidence did not show that you were singled out for disciplinary action.

The record indicates that there were a total of seven instances between January and August 1985 for which an AFLC Form 459 was prepared indicat-

ing that work was being performed by mechanics within your organization who did not possess the necessary certification (IF, Exhs. A-16, p. 93 and A-24, pp. 141-142). Three of those bore your mechanic certification stamp number. Of the remaining four, the record indicates (IF, Exhs. A-5, p. 24 and A-24, pp. 141-142) that the work order number for one pump had changed and that the mechanic's certification record had not been undated. Since the mechanic was, in fact, certified to perform this work, no disciplinary action was appropriate. Two other occurrences involved mechanics whose AFLC Forms 4341, Mechanic Certification Record, were missing. Since all mechanics must have a certification record, new forms were completed. In these two instances, the record indicates administrative correction of an oversight rather than an attempt to grant certification after the fact.

In comparison, we find that your signed mechanic certification record had been on file at the time of the incident and that it did not indicate certification on the pump in question. We found that there was no change in work order numbers which could have contributed to erroneous certification.

With regard to the remaining AFLC Form 459, the employee was counseled and an entry was made on the AF Form 971, Supervisor's Record of Employee. In comparison, we find that the same supervisory action had been annotated on the three AFLC Forms 459 containing your mechanic certification stamp number. In making the decision to go beyond simple counseling and annotation of the AF Form 971 in your case, our review of previous disciplinary actions (IF, Exh. A-9) and the multiple occurrences of misuse of your mechanic certification stamp (IF, Exhs.

A-16, A-17 and A-18) support management's testimony that a reprimand was warranted.

A review of the evidence provided in relation to formal disicplinary actions taken within your organization shows that two other mechanics, both Hispanic, were disciplined for disregard of directives, falsifying documents, and failure to comply with proper orders (IF, Exh. A-11, p. 48 and HT, pp. 160-161). In both instances a more severe penalty (three-day suspension) was assessed. This evidence supports our determination that you were not singled out for disciplinary action.

Based on the foregoing, we find that you have not shown management's reasons for reprimanding you to be pretext to mask prohibited discrimination.

It is, therefore, the Air Force decision that you were not discriminated against because of your race (Indian-American) on October 10, 1985, when you were reprimanded for falsification of official documents. Accordingly, we reject the Administrative Judge's recommended decision and corrective actions. It is further our decision that you are not entitled to attorney's fees and costs.

This decision is final in the Air Force discrimination complaint procedure. However, if you are dissatisfied with this decision, you may appeal in accordance with the attached statement of your appeal rights.

Sincerely,

/s/ Stella A. Guerra

STELLA G. GUERRA
Director
Equal Employment Opportunity

APPEAL RIGHTS

1. An appeal may be filed with the Equal Employment Opportunity Commission within *20 calendar days* of receipt of this decision. The *20-day* period for filing an appeal begins on the date of receipt of this decision. The appeal must be postmarked or, in the absence of a postmark, received by the Commission within *20 calendar days* of the date of receipt of this decision. Statements or briefs in support of the appeal may be submitted up to *30 calendar days* from the date the appeal is filed. The regulation providing for appeal rights is contained in Title 29 of the Code of Federal Regulations, a section of which is reproduced below:

Section 1613.233 Time limit.

(a) Except as provided in paragraph (c) of this section, a complainant may file a notice of appeal at any time up to 20 calendar days after receipt of the agency's notice of final decision on his or her complaint. An appeal shall be deemed filed on the date it is postmarked, or, in the absence of a postmark, on the date it is received by the Commission. Any statement or brief in support of the appeal must be submitted to the Commission and to the defendant agency within 30 calendar days of filing the notice of appeal. For purpose of this part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs. If a decision to award attorney's fees or costs is made, the decision will not be final until the procedure is followed for deter-

minining the amount of the award as set forth in 1613.271(c).

(b) When issues of discrimination have been raised in a negotiated grievance process, a complainant may file a Notice of Appeal of such issues up to 20 days after: (1) receipt of any agency decision on the grievance and expiration of the time during which the union and the agency may move the matter to the next stage of the grievance process; (2) receipt of an arbitrator's award; or (3) receipt of the decision of the FLRA on exceptions to the arbitrator's award.

(c) The 20-day time limit within which a notice of appeal must be filed will not be extended by the Commission unless, based upon a written statement by the complainant showing that he or she was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his or her control prevented the filing of a Notice of Appeal within the prescribed time limit, the Commission exercises its discretion to extend the time limit and accept the Appeal.

2. In lieu of an appeal to the Commission, a civil action may be filed in an appropriate United States District Court within *30 calendar days* of receipt of the decision.

3. If an appeal to the Commission is filed, a civil action may be filed in a United States District Court within *30 calendar days* of receipt of the Commission's final decision.

4. A civil action may also be filed any time after *180 calendar days* of the date of initial appeal to the Commission if a decision has not been rendered.

5. If a civil action is filed and complainant does not have or is unable to obtain the services of a lawyer, the complainant may request the court to appoint a lawyer. In such circumstances as the court may deem just, the court may appoint a lawyer to represent the complaint and may authorize the commencement of the action without the payment of fees, costs, or security. Any such request *must* be made within the above referenced *30-day* time limit for filing suit and in such form and manner as the court may require.

6. You are further notified that if you file a civil action, you must name the appropriate Department or Agency head as the defendant. Failure to name the head of the Department or Agency may result in the loss of any judicial redress you may be entitled to. The head of the Department of the Air Force is the Honorable Edward C. Aldridge, Secretary of the Air Force.

7. Appeals to the Commission should be forwarded to the Equal Employment Opportunity Commission, Office of Review and Appeals, 5203 Leesburg Pike, Suite 900, Falls Church, Virginia 22041. Any statement or brief in support of the appeal must be submitted to the Commission with two copies to the Air Force at the following address: Air Force Civilian Appellate Review Agency, Appellate Review Division (AFCARA/ARD), Wright-Patterson AFB Ohio 45433-5000, within *30 calendar days* of filing the Notice of Appeal.

Docket Numbers

The docket numbers identified in the upper right-hand corner of page 1 of this letter should be used on all correspondence to the Director of Equal Employment Opportunity or to the Equal Employment Opportunity Commission, Office of Review and Appeals.

APPENDIX C

BEFORE THE EMPLOYMENT OPPORTUNITY COMMISSION

Docket No.: 360-87-0066X

Agency No.: F 860159-0)

(Hearing Date: May 21, 1987)

ABEL H. HERNANDEZ, COMPLAINANT

v.

DEPT. OF AIR FORCE, KELLY AFB, TEXAS, AGENCY

Discrimination based on national origin (American-Indian)

RECOMMENDED DECISION

Date of Decision: December 15, 1987

I. INTRODUCTION

On May 21, 1987, a hearing was held on the complaint of Abel H. Hernandez (hereinafter referred to as the complainant) that he was discriminated against because his race (American-Indian), by the Department of the Air Force (hereinafter referred to as the agency), when he was given a Letter of Reprimand on October 10, 1985.

II. BACKGROUND

On October 10, 1985, the complainant was given a Letter of Reprimand for falsifying government documents prior to July 30, 1985. On October 15, 1985, complainant filed an informal complaint of discrimination. The EEO Counselor conducted an informal inquiry into the matter, but was unable to resolve the complaint to the complainant's satisfaction. The complainant filed a formal complaint of discrimination on October 30, 1985. The complaint was investigated September 8-10, 1986. On December 12, 1986 an informal attempt was made at settlement, but was unsuccessful. The Notice of Proposed Disposition was issued by the agency on March 13, 1987, wherein it was stated that there was no evidence of discrimination.

This proposed disposition was unacceptable to the complainant. By letter dated March 17, 1987, the complainant advised the agency of his dissatisfaction and requested a hearing. By letter dated March 20, 1987, the agency requested an Administrative Judge to conduct the hearing.

The case filed was received in the EEOC's San Antonio District Office on March 24, 1987. This case was initially assigned to Lutecia G.Q.-Chacon who conducted the hearing. I was reassigned the case September 8, 1987. Five witnesses testified at the hearing. No exhibits were offered or accepted into evidence.

III. ISSUE

Was complainant discriminated against because of his race (American-Indian), when he received a Letter of Reprimand on October 10, 1985?

IV. ANALYSIS AND FINDINGS

This case was heard and decided pursuant to Title VII of the Civil Rights Act of 1964, Section 701 *et seq.*, as amended, 42 U.S.C. 2000e *et seq.*, 29 CFR 1613.201 *et seq.* The analysis for Title VII cases using the disparate treatment approach is set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and its progeny, and is clarified in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). This analysis has been applied in later decisions involving a wide range of factual situations which result in complaints of discrimination.

In any proceeding, either judicial or administrative, involving a complaint of discrimination, the complainant has the initial burden to prove, by a preponderance of the evidence, that there is some substance to his allegation of discrimination. In order to meet this burden, the complainant must establish a *prima facie* case. This means complainant must present sufficient evidence from which, if not rebutted, the trier of fact could reasonably infer unlawful discrimination did occur.

In this case, to establish a *prima facie* case of discrimination, because of race (American-Indian) the complainant might show:

(a) that he is a member of a protected group;

(b) that others not of complainant's protective group were not disciplined for the same conduct committed by complainant; or

(c) that the discipline occurred under circumstances if left unexplained support an inference of discrimination.

McDonnell Douglas, 411 U.S. at 802; 93 S.Ct. at 802.

The specific evidence required to prove pretext depends on the circumstances of each case. However, in *Burdine*, the Court opined a complainant may succeed in demonstrating pretext by either directly persuading the court that a discriminatory reason more likely motivated the agency or indirectly by showing the agency's proffered explanation is unworthy of credence. 450 U.S. at 256, 101 S.Ct. at 1095. Complainant might also show pretext by producing evidence that the agency has a general policy or practice disfavoring complainant's group, evidence of the agency's past discriminatory treatment of complainant or evidence that the agency has traditionally reacted improperly to legitimate civil rights activities. *McDonnell* Douglas Corporation, 411 U.S. —— —— —— all times has the ultimate burden of persuading the trier of fact that defendant intentionally discriminated against the complainant. See *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25, n.2, 99 S.Ct. 295, 296, 58 L.Ed.2d 216 (1978).

A. FACTS

Abel Hernandez, an American-Indian, was employed as a WG-8255-09 Mechanic at Kelly Air Force since 1982 (I.F., Ex. A-9, pg. 35; hereinafter referred to as I.F., Ex.). At the time of the alleged incident giving rise to the charge, Hernandez was employed in the Hydraulic section (MATPPA) repairing equipment. This section required each mechanic to become "certi-

fied" for each different type of equipment that the mechanic repaired or could have repaired on a yearly basis (I.F., Ex. 18, pg. 99; H.T. 167; hereinafter referred to as H.T.). This system of requiring mechanic certification was called the Production Acceptance Certification Program (PAC). Before an individual could be "certified" as to any type of equipment, he had to demonstrate his proficiency to the satisfaction of his foreman and the quality control inspector (H.T. 70). Although there was not a formalized training program in place to obtain certification per se, the mechanics gained sufficient proficiency in a variety of ways such as reading manuals, watching others, self-teaching, etc. (H.T. 16, 18, 66, 68, 86, 92, 100, 101, 105, 155). Once the mechanic acquired the necessary approval for certification, this information was then documented on the individual's Mechanic Certification Record, AFLC Form # 4341 (I.F. Ex. A-12 pg. 50; H.T. 81, 82). For the convenience of the mechanics and as a quality control device, since there was from 38 to 400 items involved, depending on the witnesses asked (H.T. 80, 110, 149, 155, 156), each mechanic was assigned a permanent number (I.F., Ex. A-13, pg. 53) which he was required to use for each piece of equipment upon which work was performed (I.F. Ex. A-12, pg. 50, Ex. A-18, pgs. 98-131; H.T. 129). This number, or "stamp" as it was referred to, was "stamped" on the paperwork that accompanied each piece of equipment through the repair process (I.F. Ex. A-18, pg. 99). Therefore, by looking at the paperwork accompanying a finished product it was possible to determine which mechanic, via the stamp number, had completed a part or the whole of the repaid process (I.F. Ex. A-18, pg. 98; H.T. 129). On July 30, 1985 a quality audit of previ-

ously repaired equipment was conducted (I.F. Ex. A-3, pg. 16, H.T. 141). Several pumps bearing Serial # 10024A, after having been repaired, were found to be defective; the accompanying paperwork bore complainant's stamp number. Complainant's form # 4341 indicated he had not been certified to service this type of pump (I.F. Ex. A-16, pg. 92-96, Ex. A-17, pg. 97; H.T. 60, 76, 88). The charge of falsification of government documents is predicated on the above incidents i.e. non-certification to work on this piece of equipment (I.T. Ex. A-23, pg. 139).

B. *Prima Facie Discussion*

Complainant has shown he is an American-Indian (H.T. 17; I.F. Ex. A-1, pg. 10), even though his personnel records list him as Mexican-American. The complainant had four years of work experience as a pneudraulic systems mechanic without incident which establishes his qualification to perform the duties of that position (I.F. Ex. A-13, pg. 53; H.T. 132). Other evidence submitted showed other mechanics not of complainant's protected group also certificated work for which they were not authorized to perform and were not reprimanded (I.F. Ex. A-3, pg. 17, Ex. A-24-141, Ex. A-4, pg. 20; H.T. 144). The evidence further disclosed the complainant was disciplined without a complete and full investigation of the facts and circumstances surrounding the alleged misconconduct; the complainant and/or the supervisor responsible for assignments at the time of the incident were not interviewed to determine the actual circumstances (I.F. Ex. A-2, pg. 71; H.T. 75) as to why this equipment was repaired. Moreover, other mechanics who performed work on items for which they had not been certified were not disciplined or received

less severe discipline for having done so (H.T. 85, 144-145; I.F. pg. 24). These facts, if left unexplained, raise an inference that the reprimand was the result of discriminatory motives or intent. The plaintiff therefore has established a *prima facie* case under the dictates of *Teamsters v. United States*, 431 U.S. 324, 385, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 n.44 (1977) and *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978). *See also, McDonnell Douglas v. Sante Fe Trail Transportation*, 427 U.S. 273, 965 S.Ct. 2574, 4 L.Ed.2d 493 (1975); *U.S. Postal Service v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983). *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3rd Cir. 1987) (in banc).

C. *Agency's Articulated Reason*

The agency's articulated reason for its action basically is that the complainant did not comply with the mandates of the Production Acceptance Certification Program because he worked on equipment that according to the "records" he was not authorized to perform any tasks upon. The purpose of the Production Acceptance Certification Program (PAC) is a valid management objective to control the quality of its end product, its implementation creates the problem in this case. The question posed in this determination is, can one "look behind" the PAC to determine if the PAC was a "cover" to hide otherwise discriminatory conduct. In short was the PAC used as an excuse to hide discriminatory motives or animus for disciplining the complainant? In *EEOC v. Halls Motor Transit Company* 609 F.Supp. 852, 861 (W.D. Pa. 1985), the District Court was faced with a similar factual situation. There a minority employee was discharged

pursuant to the valid provisions of a collective bargaining agreement. The District Court held since a grievance based upon the same factual premise was upheld, a legitimate articulated reason existed, which ended all further inquiry or challenge. However, the Third Circuit, reversing the lower Court, held it was permissible to "look behind" the grievance process and/or collective bargaining agreement to see if there was a "disparity of result." *EEOC v. Halls Motor Transit Company*, 789 F.2d 1011, 1015 (3rd Cir. 1986). Therefore, an analysis of the purpose and function of the PAC and how it was used to discipline complainant is in order.

It is apparent from the evidence submitted that a problem existed, and to a certain extent still exists at Kelly Air Force Base insofar as maintaining the efficiency of its service facilities is concerned (I.F. Ex. A-14, pg. 55). Thus, the PAC program was instituted to guarantee the integrity and quality of the parts that are repaired at the facility prior to their installation in any aircraft. To accomplish this purpose, a more structured training program is outlined in PAC along with safeguards for testing the product and quality inspections. However, the evidence disclosed that despite the lofty goals of the PAC, some replacement parts after being repaired are found to be defective. The mechanic who repairs the parts involved is primarily responsible for the integrity and quality of the end product (H.T. 112), but the PAC Program places the responsibility for making sure a defective part does not end up in an aircraft upon the Testers and Quality Control Inspectors. Thus, to determine if the PAC Program is functioning propertly, one only has to determine at what stage of the process a defective part was discovered to determine who shares

the blame; with this as a starting point, the inquiry turns to the facts as developed in this case.

The evidence disclosed that a quality inspection was initiated after several defective pumps were noticed in Jully of 1985 (I.F. Ex. A-16, pg. 93). When defective parts are found after "repair" they are written up on a form 459 and returned to whence they came (I.F. Ex. A-16, pg. 93; H.T. 51). The testimony established that upon the receipt of the Form 459 the supervisor and mechanic responsible for the defective part would get together in an attempt to correct the problem (I.F. Ex. 3, pg. 16; H.T. 97, 107). However, in this case, prior to any action on the 459, the Quality Assurance Specialist (Ms. Johnson, who is black), had already instituted via Form 389, a more severe form of discipline for the complainant (I.F. Ex. A-16 pg. 92; H.T. 63) without further investigation. The evidence further disclosed that the supervisor (Mr. Kiletyka, a Caucasian) when "counselling" the complainant, when only faced with the 459 (I.F. Ex. A-16, pg. 93), did nothing further in the way of discipline than note it on the complainant's 971 which is the normal procedure for most deficiencies (H.T. 107). The evidence further disclosed that although the Quality Assurance Specialist had no role in determining the pumps in question were defective [*See* "Initiator" No. (10-15) on Form 459], i.e., she recommended formal disciplinary action (Ex. A-16, pg. 92). Additionally, the evidence established that complainant had repaired other equipment which was not found to be defective and had been "sold" without "certification" for at least eight months prior to the incidents herein (I.F. Ex. A-17, pg. 97; H.T. 72). The evidence without dispute established that there was sufficient available documentation, records and

even a computer, which if they had been used, would have disclosed complainant's conduct "prior to" the Quality Assurance Specialist's "discovery" (H.T. 11, 63; I.F. Ex. A-18, pg. 99-130).

I find from the evidence, that management used a double standard in the handling of complainant's "unauthorized" and "defective work," which is best summarized by the following examples: If a mechanic who produced a defective part was certified, the part was still defective, but management would attempt to determine the cause of the problem (H.T. 107), as evidenced by the supervisor's initial reaction to the 459 covering the same defective part. However, in this case only, since the complainant had produced the defective part while not being certified, the part remained defective, but management made no attempt to determine if there was an inherent problem within the part but sought to "punish" the complainant (H.T. 147, 150). Likewise, the evidence established that complainant as well as other mechanics repaired pumps which were "sold" (warehoused for use) without "authorization" (I.F. Ex. A-24, pg. 141, 142; H.T. 72, 144, 150, 157) and by management's own criteria, this was accepted as showing the mechanic was qualified (H.T. 92).

I find *no* discipline was meted out to other "offenders" (those not certified) who produced non-defective parts even though the Quality Assurance Specialist was responsible for this not happening (H.T. 147; I.F. Ex. A-24, pg. 142, 153). The record established that after the fact, ways were found to "certify" those other complainant, who were involved in noncertified work (I.F. Ex. A-24, pg. 141, 142) when "discovered" H.T. 101). I find when complainant attempted to show he was previously certified to perform this type

of work, the supervisor (of only one month's standing), while concurring in the Quality Assurance Specialist's recommendation to decertify and reprimand the complainant, reacted in the following manner:

(1) The disciplining supervisor made no attempt to contact or ascertain from complainant's previous supervisor the true facts as to what was "authorized" (I.F. Ex. A-2, pg. 13). (See H.T. 163).

(2) The disciplining supervisor did not discuss the matter with complainant before acting (H.T. 75).

(3) Although other records indicated complainant had previously worked on these and other pumps wtihout incident in the past, this did not prove "certification" (although they bore # 80413 and sold without incident) because complainant did not "prove" he worked this equipment alone (H.T. 78, 79) although only his stamp number appeared.

(4) The disciplining supervisor knew or could have ascertained that complainants certification card had been lost or was inaccurate (H.T. 167, I.F. Ex. A-1, pg. 11).

(5) Although the disciplining supervisor had no practical mechanical experience and could not perform the functions required by complainant's position, he could "visually" determine when work was due to faulty workmanship if it were an external problem (H.T. 97, 98).

I find based upon the above the mandates of the PAC were not the reason for decertifying complainant as

a mechanic. Other evidence submitted portrayed the Quality Assurance Specialist's role in initiating the decertification from which her motives can be inferred:

(1) The specialist asserts she did not know the identity of complainant when reviewing the Form 459's (H.T. 143).

(2) This specialist of three years' standing, who only worked in Building 323 (H.T. 141) was one of three specialists assigned to review the work therein (H.T. 149).

(3) This specialist worked on a daily basis with the same mechanics while having at all times access to their AFLC 4341 numbers (H.T. 82, 143, 145; I.F. Ex. A-3, pg. 16).

(4) The section in which complainant worked only had ten mechanics (I.F. Ex. A-10, pg. 45).

(5) When the specialist checked complainant's AFLC 4341 to ascertain if he was certified she reacted differently than in the past when confronted with "non-certified" work (H.T. 147, 150).

I find based on this evidence, that the specialist may not have known that pumps complainant was certified to work on, but she certainly knew stamp number 80413 was complainant's. I further hold that the specialist knew complainant belonged to a different minority group than she (black) and it is not necessary for this decision to determine if the specialist was able to correctly identify complainant's race (or

ancestry) (H.T. 146).[1] Moreover, in his affidivat complainant stated: "Because I am of a darker color (than other Mexican-Americans), the supervisor's (sic) should have known that I am of Indian descent." (I.F. pg. 10).

The evidence disclosed it was common practice to give mechanics pumps to work on, for which they were not certified (I.F. Ex. A-6, pg. 26). When a mechanic refused to "stamp" one of these non-certified pumps when completed, the supervisor would "stamp off" (H.T. 86) even though the supervisor (Caucasian), as in this case, had no practical experience as a mechanic to perform the necessary functions to repair the defective pump in question (H.T. 97). I further hold that a system which takes the mechanics "word" for non-existent training, as a prerequisite for certification (H.T. 44, 85, 86, 92, 131) and then bases its disciplinary action for not being certified on the lack of "documentation of training" (H.T. 64, 74, 79, 80,

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[1] *See St. Francis College v. Al-Khazaraji,* —— U.S. ——, 107 S.Ct. 2022, 2028 p. 46, 928 affirming 784 F.2d 505 (3rd Cir. 1986) wherein Justice Brennan in his concurring opinion states:

> Moreover, national origin claims have been treated as ancestry or ethnicity claims in some circumstances. For example, in Title VII context, the terms overlap as a legal matter. See 29 CFR Section 1606.1 (1986).

See also Gonzales v. Standford Applied Engineering, Incorporated, 597 F.2d 1298, 1300 (9th Cir. 1979); *Manzanares v. Safeway Stores,* 593 F.2d 968, 970 (10th Cir. 1979). The agency's position was that they knew complainant was Hispanic or Mexican-American (national origin), but not that he was American-Indian (ancestry). As stated by the Supreme Court in *St. Francis College,* and the 9th Circuit in *Gonzales,* the complainant in this case has established his "membership in a group."

88, 128; I.F. Ex. A-4, pg. 19, 20) is highly suspect to say the least. The hypocrisy of the standards as they were applied to complainant is best summarized by complainant's disciplining supervisor when he said:

> . . . .(I)t can also be viewed that a mechanic if he can take the instruction manuals and interpret that into putting an item together, I also view that as competent training, if he can prove to me that he can build an item and get an item passed on the test stand.

(H.T. 92).

However, the fact that complainant had the items pass the "test stand" was not sufficient in his case to be certified, as evidenced by the same superviser's memo to the record (I.F. Ex. A-17, pg. 97) and the task list attached to AFLC Form 389 dated July 30, 1986. I find it of great significance that a supervisor of one month's supervisory experience could make the decision to "decertify" a mechanic (in effect remove him from his livelihood) based on reviewing the "records" when the facts establish there was a high "rejection," rate for all "repaired" items caused by a variety of reasons, even for mechanics who were "certified" (I.F. Ex. A-5, pg. 22, I.F. Ex. A-14, pg. 55). The job standard did not insist on 100% efficiency for certified mechanics (I.F. Ex. A-8, pg. 31). Yet 100% efficiency is the standard by which complainant is being reprimanded. I also find if of major significance that the Quality Assurance Specialist whose responsibility included making sure mechanics were properly certified but did not, shared none of the blame for "sold" parts being produced by uncertified mechanics or specifically her dereliction of duties in the defective parts at issue.

I make several other observations about the PAC and its application in the instant case which only fortify my findings. From all of the evidence as presented, the PAC is a good example of bureaucracy at its zenith, as shown by reviewing a typical *work control document* i.e. Form 958 (I.F. Ex. A-24, pg. 99, 100). Item 5 of this document shows the work was scheduled for July 22, 1985, the mechanic stamp shows the work was completed on July 22, 23, 1985 (Item 18) while Final Tagging and Inspection were done on July 31, 1985 (Item 19). *However*, the last item on page 100 of this document bears the signatures of four (4) individuals *including* the *Quality Assurance Specialist* in this case *dated* March 25 and 26, 1985, months before *any repair* work was undertaken. The only inference which can be drawn is that four individuals reviewed the *blank* piece of paper and found it in order and signed off. Unless I overlooked some other evidence, I do not see the significance of this procedure in assuring the quality of the finished product.

In addition, a comparative analysis of I.F. Ex. A-16, pg. 93, (the Form 459's that triggered the revocation or the reprimand at issue) to the work control documents which correspond to the 459's (I.F. Ex. A-18, pg. 99 is xerox copy of item #2 of page 93; I.F. Ex. A-18, pg. 101 is xerox copy of item #1 and item #3 of page 99) against the criticality of Fuel Booster Pumps Report (I.F. Ex. A-19, pg. 132) leads to some very interesting observations: First, of all, none of the pumps listed as defective on the 459 were the subject matter of the Criticality Report; yet the reprimand was in part based on this report (H.T. 158). Second, although there were four (4) different pumps under discussion in the Criticality Report, complain-

ant was only involved with one pump (I.F. Ex. A-18, pg. 111) which had been "sold," thus it was not defective. Besides asking how this pump got through the PAC system, the document shows four (4) different stamp numbers M# 80413, T# 1840, M# 70815, M# 80583; M=Mechanic Stamp, T= Test Stamp) as having performed functions on the part. Yet we find testimony under sworn oath as if complainant was the only one who would be held accountable for the future failure of this pump as follows:

> I made an inquiry into the critically of the pump Mr. Hernandez worked on. I received a reply, 19 August 1985 . . . pump had a back up . . . pilot would not be killed or aircraft lost . . . we decided to give Mr. Hernandez a reprimand as opposed to a suspension.

(I.F. Ex. A-5, pg. 23).

[Note the record is silent as to the "criticality" of pump # 10024 which triggered the 459 and 389 (I.F. Ex. A-19, pg. 1320].

Management further attempted to compare complainant's "falsification" with another "falsification" case in which a *certified* mechanic did not modify a piece of equipment while stating he had, which resulted in the destruction of an aircraft (H.T. 159). I find this alleged comparison to be of value only in drawing an inference on the issue of "motive" for disparate treatment. The mechanic (not in complainant's protected group) who was guilty of intentional fraud and misconduct which caused the loss of an airplane was accorded the following treatment:

> We did save the employee's job.

(H.T. 159).

This same supervisor (Mr. Trevino, complainant's second level supervisor) also testified about instances where a mechanic had a workmanship problem similar to the instant case. He stated:

> And the mechanics usually get a counselling. And then if they continue, and in some cases they have, we have oral admonishments. If they continue, then a reprimand.

(*Id.*)

I find, based on all of the evidence, that the agency's articulated reason i.e. falsification of documents does not withstand scrutiny and is pretextual.

V. CONCLUSION

Based upon all of the foregoing, the following summary conclusions are reached:

(1) The complainant established a *prima facie* case of discrimination based on race (American-Indian).

(2) The agency has articulated legitimate non-discriminatory reasons for its action.

(3) The complainant proved that the agency's articulated reasons were pretext.

VI. RECOMMENDED DECISION

I recommend a finding of discrimination based on race (American-Indian).

VII. CORRECTIVE ACTION

As corrective action in this case, I recommend that reprimand be removed from his records and any employment benefits lost as a result of said reprimand be restored as of the date lost.

VII. NOTICE

Pursuant to Section 1613.220(d) of Part 1613 of the Equal Empolyment Opportunity Commission Regulations, the Administrative Judge's Recommended Decision SHALL BECOME THE FINAL DECISION BINDING ON THE AGENCY if the agency has not issued a final decision adopting, rejecting, or modifying the Recommended Decision within 60 calendar days after the date the agency received the Recommended Decision. In such event, the agency shall notify the complainant that pursuant to Section 1613.220(d) of Part 1613 of the Commission Regulations of the Administrative Judge's Recommended Decision is the agency's final decision and furnish to him a copy of the findings, analysis and Recommended Decision of the Administrative Judge under Section 1613.218(g) and a copy of the hearing record. The agency shall also notify the complainant in writing of his right to appeal to the Commission and the time limit applicable thereto and of his right to file a civil action as described in Section 1613.281. Further, the agency shall provide the Administrative Judge with a copy of his final decision on each complaint on which a recommended decision has been issued.

/s/ John J. Lokos

JOHN J. LOKOS
Administrative Judge

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